

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

Owensboro, KY

EXTENDICARE HOMES, INC., d/b/a
BON HARBOR NURSING AND
REHABILITATION CENTER¹
Employer

and

Case 25-RC-10230

UNITED STEELWORKERS OF
AMERICA, AFL-CIO, CLC
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held March 30, 2004, before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board, to determine an appropriate unit for collective bargaining.²

I. ISSUES

United Steelworkers of America, AFL-CIO, CLC, (the "Petitioner") seeks an election within a unit which includes, *inter alia*, all licensed practical nurses ("LPNs") employed as by Extendicare Homes, Inc., d/b/a Bon Harbor Nursing and Rehabilitation Center (the "Employer") at its Owensboro, Kentucky, facility. The Employer, however, contends that the LPNs should

¹ The Employer's name has been corrected consistent with the parties' stipulation.

² Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer's rulings made at the hearing are free from error and are hereby affirmed.
- b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
- c. The labor organization involved claims to represent certain employees of the Employer.
- d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

not be included in the unit because they are supervisory employees within the meaning of Section 2(11) of the Act. There are approximately 21 LPNs employed at the facility, 16 of whom work on a full-time basis, and 5 of whom are employed on a part-time basis.³ The parties have otherwise agreed upon the composition of the appropriate bargaining unit, and the status of LPNs is the only issue in dispute⁴.

II. DECISION

For the reasons discussed in detail below, including the failure of the Employer to demonstrate that its LPNs responsibly direct, discipline, reward employees, adjust employee grievances, or effectively recommend such actions with the requisite degree of independent judgment, it is concluded that the Employer's LPNs are not supervisors within the meaning of Section 2(11) of the Act and therefore they are included in the appropriate unit for purposes of collective bargaining.

The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time licensed practical nurses, certified medication assistants, certified nursing assistants, dietary, housekeeping, laundry, and activities employees employed by the Employer at its Owensboro, Kentucky, facility; BUT EXCLUDING all office clerical employees, directors of nursing, unit managers, MDS coordinators, staff development coordinators and all guards and supervisors as defined in the Act.

The unit found appropriate herein consists of approximately 115 employees for whom no history of collective bargaining exists.

III. STATEMENT OF FACTS

A. Overview of Operations

The Employer operates a long-term care facility licensed by the Commonwealth of Kentucky. The facility has a total of 132 beds and is divided into four units. The skilled unit (with room numbers in the 400 series) houses patients needing the most care and has 44 beds. The west unit (rooms in the 300 series) has 28 beds, while the south and north units (rooms in the 200 and 100 series respectively) each house 30 beds. The Employer's operations are divided

³ The LPNs are also referred to as "LPN charge nurses" by the Employer; however, herein they are designated as LPNs.

⁴ The parties have stipulated that since all LPNs perform the same functions and possess the same responsibilities and authority, the same status should apply to the entire group.

into several departments: dietary, social services, housekeeping and laundry, maintenance, therapy, activities, business, admissions, and nursing. Each of these departments is managed by a department head who reports to the Administrator. The department heads and the Administrator work Monday through Friday from 8:00 a.m. to 5:00 p.m.

B. Nursing Department

The Nursing Department is primarily responsible for the medical and physical care of the patients/residents. Overall responsibility for the Nursing Department rests upon the Director of Nursing ("DON").⁵ The DON works Monday through Friday from 8:00 a.m. to 5:00 p.m. and reports directly to the Administrator. The Employer's two MDS Coordinators are members of the Nursing Department and report directly to the Administrator. The MDS Coordinators are responsible for planning and assessing the care of patients and ensuring that the proper paperwork is prepared under state and federal laws for Medicare and Medicaid.⁶ The responsibilities of hiring, staffing, and scheduling in the Nursing Department are held by the Staffing Development Coordinator, who reports to both the Administrator and DON.⁷ Also in the Nursing Department, reporting to the DON are two Unit Managers and a Weekend Nursing Supervisor.⁸ The Unit Managers are responsible for the oversight of the four units, including responsibility for directing patient care as well as personnel issues. One Unit Manager supervises the Skilled and West units while the other supervises the North and South units. The Unit Managers, MDS Coordinators, and Staffing Development Coordinator all work Monday through Friday, 8:00 a.m. to 5:00 p.m. Presumably the Weekend Nursing Supervisor, who is a RN, works Saturday and Sunday and has overall responsibility for the Nursing Department during that time; however, her precise hours and the scope of her authority are not reflected in the record. The parties also stipulated that the facility's sole RN Charge Nurse is a statutory supervisor, although the record does not describe her duties, responsibilities and authority with any specificity. A comparison of the RN job description with that of the LPN description reflects not only that the RN performs therapeutic treatments for patients consistent with her more advanced medical training, but that s/he also plays a role in establishing and monitoring nursing home policy. For example, the RN participates in the development of patient care plans and attends patient care conferences, while LPNs are expected to comply with the plans. The

⁵ The parties entered into a stipulation that the DON is a supervisor within the meaning of Section 2(11) of the Act since she has the authority to hire and fire individuals.

⁶ The parties agreed to exclude the MDS Coordinators from the unit on grounds that they lack of a community of interest with members of the bargaining unit.

⁷ The parties stipulated that the Staffing Development Coordinator is a supervisor within the meaning of Section 2(11) because she has the authority to determine the work hours of each LPN, CNA and CMA. She assigns them a particular shift, unit and work days.

⁸ The parties stipulated that the Unit Managers and Weekend Nursing Supervisor are supervisors within the meaning of Section 2(11) of the Act since they have the authority to discipline employees, assign work, and direct the work of other employees.

RN also "helps determine policies for improvement of care," and "Conducts weekly shift meetings with nursing assistants." Unlike LPNs, the RN also "Participates in marketing events." One year of supervisory experience is a preferred qualification for hire, while no comparable experience is desired for employment as an LPN.

The remainder of the Nursing Department consists of the 21 LPNs, approximately 62 certified nursing assistants (CNAs), and three certified medication assistants (CMAs). These employees work one of three shifts, which are from 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., and 11:00 p.m. to 7:00 a.m. As previously mentioned, 16 LPNs work full-time, while 5 work part-time. Staffing is greatest in the skilled unit. On the first shift there are two LPNs, five CNAs, and one CMA. On second shift there are two LPNs and four CNAs, while third shift is staffed with two LPNs and two CNAs on the skilled unit. The Unit Manager who oversees the skilled unit also oversees the West unit. One LPN and three CNAs staff each of the West and South units during the first shift, while one LPN and two CNAs staff the units on second shift. On the third shift there is one LPN and one CNA on each of the West, South, and North units. On the first shift the North unit is staffed by three CNAs and either one LPN or a CMA. In the absence of an LPN, the Unit Manager will oversee the North unit during the hours she is present in the facility. On the second shift the North unit will also have two CNAs, but will either be staffed with one LPN or one CMA. If the North unit is staffed by a CMA, the LPN assigned to the South unit will float to monitor the North unit as well. Upon occasion, one LPN will float between the North and South units during the third shift.

The MDS Coordinators develop a care plan for each patient which presumably identifies the care required by each patient. The overall responsibility of the Nursing Department staff is to provide resident care consistent with the patients' assessments and care plans. Functions performed by CNAs and CMAs involve primarily personal care as opposed to medical care, and include bathing, shaving, trimming nails, changing patient dressings; assisting the residents with feeding; repositioning of the residents; and other duties related to the physical well-being of the residents. The CMAs dispense certain medication to the patients as well as perform CNA duties. According to the Employer, the CNAs and CMAs report directly to the LPNs on their units. When two LPNs are working at the same time on the same unit, they divide responsibility for the unit among themselves.

Like CNAs, CMAs, and other members of the prospective unit, LPNs earn an hourly wage and are eligible for the same fringe benefits as other prospective unit members. CNAs generally earn between \$7.00 and \$9.00 per hour while the entry level wage for an LPN is \$14.00. Those LPNs, CNAs and CMAs who work the second shift receive a 95 cent per hour shift differential in addition to their hourly wage, and those who work the third shift receive a \$1.00 per hour differential. The record does not indicate whether members of the Nursing Department who are stipulated supervisors earn a salary or hourly wage.

LPNs, CNAs and CMAs record their arrival and departure times via a time clock. When someone fails to "punch" in or out, a "Missing Punch Report" is completed. The report documents the hours the individual worked and is signed both by the individual and an LPN on duty. Later the document is initialed by the facility's Administrator.

C. Job Duties of the LPNs

The "Summary of Position" in the LPN job description describes the essence of the position as follows⁹:

Under the supervision of the RN Care Manager/DON, a Licensed Practical Nurse/LVN performs as a licensed care giver and assumes responsibility and accountability for assigned residents/patients for a shift of duty. Nursing care is provided through coordination, implementation, and evaluation of the resident's/patient's plan of care...

The Employer asserts that the LPNs perform certain duties set forth in the job description as "supervisory functions." Thus, the Employer asserts that LPNs make daily work assignments, including scheduling lunch and rest breaks, authorizing overtime, and authorizing early departures from work; direct the work of CNAs; enforce employer policies and issue disciplinary action; prepare written employee evaluations; authorize variances in time records; and handle employee complaints and adjust grievances. The LPN job description additionally indicates that the LPNs interview applicants and conduct new employee training and orientation. The witness testimony at hearing, however, establishes that LPNs do not interview employment applicants, nor conduct new employee training or orientation. Nor does the Employer assert that the LPNs interview applicants for employment. Despite the Employer's portrayal of the LPNs performance of those "supervisory functions" in the LPN job description, record evidence fails to establish that LPNs perform any of the asserted duties while exercising the requisite independent judgment to make them supervisors within the meaning of Section 2(11).

Although the record contains an occasional reference to the fact that at times a CMA may also be "in charge" of a unit, further explanation is not provided.

1. Assignment and Direction of Work

The daily work schedule for each LPN, CNA and CMA is prepared by the Staffing Development Coordinator. The Coordinator assigns each LPN, CNA and CMA to a specific shift, a specific unit, and to work specific days of the week. This daily schedule is handwritten and is located in the breakroom. Due to a high rate of staff turnover and absenteeism, it is often necessary to secure replacements for absent CNAs. LPNs may be notified of prospective absences on succeeding shifts, or absences on their own shifts. In an attempt to locate a substitute, LPNs may call a CNA who is not scheduled to work that shift; may ask a CNA who is about to complete a shift to extend her work hours into the next shift; may request the transfer of a CNA from another unit; or may work with fewer CNAs than originally scheduled. CNAs are transferred from one unit to another only with the concurrence of the "lending" unit, and only

⁹ The description indicates that the LPN is responsible for executing patient care plans, while the RN appears to play a role in the development of the plans and other policy.

when the patient census in that unit permits.¹⁰ When contacting off-shift CNAs, the LPNs may contact whomever they wish; however, LPNs cannot compel off-duty employees to work. Even though it is not necessary for the LPN to obtain permission from a higher authority in order to request a CNA to work beyond the normal end of her shift, the LPNs cannot compel employees to work overtime. It is also possible that the shift will have to work short if a replacement cannot be found. If an employee calls in an absence during the hours worked by the DON, Unit Managers, and Staffing Development Coordinator, the LPN may refer the search for a replacement to them.

Each LPN receives a "shift report" from the LPNs of the preceding shift noting any changes in patients' conditions or any other unusual events which occurred during the previous shift. After the LPNs have addressed any staffing shortage, they discuss any changes in residents' conditions with the off-going nurse(s). The LPNs then relay this information to the CNA/CNAs on their shift. The LPNs also alert the CNAs if a particular resident has an appointment scheduled on the unit's calendar for that day in order to enable the CNA to ensure that the resident is dressed, fed and ready at the appointed time for departure. Nursing assignment sheets designate a specific CNA to the care of a designated group of residents. The nursing assignment sheets are generally completed by the LPNs in consultation with the patient/resident's medical care plan. The assignment sheets contain information such as the days designated for a resident's bath/shower; whether the resident is able to use the dining service or needs assistance eating; whether the resident is ambulatory or needs assistance, and whether one or two people are required to lift the patient. According to the record, these assignment sheets are filled out in advance and photocopied. The assignment sheets are not modified or changed on a daily basis, and in fact may be rarely changed unless the condition of a patient necessitates a change in his/her care. Thus, while the CNAs rotate servicing groups of patients, the patients' care needs rarely change. The CNAs refer to these sheets to determine the care needs of each patient each day, and check off each task as it is performed. At the end of the shift, the completed assignment sheets are placed into a binder at the nursing station on each unit. The assignment sheets are also used to assign each CNA to a group of residents. Residents are grouped together in such a fashion as to distribute the patient-care work load as evenly as possible among the CNAs. The CNAs on each shift and unit rotate through the patient groups. Thus, a CNA will be assigned to a particular group of residents for approximately one week before being assigned to another group.

During the shift, LPNs make rounds of the residents. The LPNs dispense medications and provide therapeutic treatments for residents, such as flushing G tubes and handling IVs. While making their rounds the LPNs also monitor the work of the CNAs. They may verbally instruct CNAs to perform some task correctly, or to perform certain functions as needed. During the shift the LPNs also assign break and meal periods for the CNAs, although it is not known how these functions are allocated between the LPNs when two staff a unit. Break and meal periods appear to be designated on each CNA's daily assignment sheet. At times the break

¹⁰ The number of patients on each unit (known as the "patient census") may vary daily, due to patient deaths or absences due to hospitalization or other reasons.

designation may state generally that the first break should be taken after breakfast and bed checks have been completed, while lunch designations may indicate a specific time.

Although the Employer asserts that LPNs can also authorize a CNA's early departure from work due to illness or other reasons, there was no testimony clarifying or explaining the circumstances under which such authorization can occur, nor any testimony concerning any real exercise of independent judgment in authorizing early departures.

2. Discipline

The Employer's Employee Handbook contains a list of work rule violations, which are classified into three categories dependent upon the severity of the offense. Discipline appropriate for repeated violations of the same class of offenses is also indicated. According to the DON, the disciplinary procedure is progressive and employees receive various levels of discipline automatically depending upon previous discipline and the severity of the rule violation. Rule infractions are recorded on Disciplinary Action Report forms. These forms are located at each nurses station. According to the DON, if an LPN observes behavior on the part of a CNA or CMA which s/he regards as a violation of company rules, the LPN can complete a Disciplinary Action Report. A description of the alleged misconduct and the work rule which was allegedly violated is written on the form. The LPN gives the offending employee an opportunity to read the document and to write her/his version of events on the document. The form also has a place to record any prior disciplinary action in the employee's file. LPNs do not have access to employee personnel files, however, and therefore this section of the form is routinely left blank. In addition, the form contains a space to describe the disciplinary action: i.e. first notice, second notice, final notice, discharge warning or discharge from employment. Fourteen Disciplinary Action Reports regarding the behavior of a CNA and signed by an LPN were placed into the record. The dates on these forms range between December 5, 2001 and February 19, 2004, but it is not known whether these 14 documents represent all Disciplinary Action Reports completed during this time period. On five of the reports there is no indication of the level of disciplinary action being issued. Seven reports indicate they are a "first notice." One report indicates it is a "second notice," and another indicates it was a "final notice." According to the LPN who documented this "final notice" incident, however, she did not determine the level of discipline for this incident. Rather, she reported the incident to her Unit Manager who met with her and the CNA, and it was the Unit Manager who decided that a final notice should issue. Since LPNs do not have access to employee personnel files they would not know whether an employee had been previously disciplined for an infraction of a similar category unless they had personally observed the incident. According to the DON, however, if an LPN checkmarks a level of discipline on a report, and it is later determined that because of a prior discipline in the CNA's file, the discipline should have been of a higher level, the discipline is not changed. If this is the case, the progressive system of discipline described in the Employee Handbook is a nullity. After the form is presented to the CNA for his/her comments, it is forwarded to the appropriate Unit Manager and/or DON.

According to the testimony of the DON, LPNs possess the authority to send a CNA home for misconduct. This authority, however, is restricted to only severe misconduct such as resident abuse, the absolute refusal to perform job duties, or intoxication. The record reflects only one

such instance approximately five years ago when an LPN received authorization from the DON to send an employee home as long as she had a replacement employee for the CNA.¹¹ The record does not indicate the misconduct involved.

3. Evaluations, Rewards and Adjustment of Grievances

CNAs receive performance evaluations on a yearly basis. The Staffing Development Coordinator notifies the appropriate Unit Manager when a CNA evaluation is due. The Unit Manager then determines which LPN should complete the evaluation of the CNA. The evaluations consist of ten areas which are scored on a numeric system, along with a place for narratives of strengths and areas of improvement. The LPN assigns scores to the ten areas which are then totaled to provide a final score. The record indicates that LPNs are generally aware that the total score has some correlation to the amount of a raise a CNA may receive; however, LPNs are unaware of what the correlation is. The LPNs do not know what score is necessary to receive a particular raise; nor do they know of any formula used to determine the amount of raises issued. According to the two LPNs who testified at hearing, they merely rate the CNA and pass the evaluation along to the Unit Managers. Indeed, the record does not reflect what, if any, formula may be used by the Employer to determine the amount of raises issued CNAs and CMAs.

The Employee Handbook contains an employee complaint procedure which provides that if employees have a concern or problem, they should discuss it with their “immediate supervisor.” According to the DON, the procedure in the Nursing Department is for a CNA to direct any first step grievances to an LPN. Also according to the DON, the LPNs have the authority to resolve issues such as work assignments, lunch and rest break periods, and co-worker problems. However, the record contains no specifics of LPNs adjusting grievances or playing a role in the resolution of employee complaints.

IV. DISCUSSION

To determine whether an individual is a supervisor within the meaning of Section 2(11) of the Act, the Board examines: (1) whether the individual has the authority to engage in any 1 of the 12 enumerated powers listed in Section 2(11) of the Act; and (2) whether the exercise of such authority requires the use of independent judgment. NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571, 573-574 (1994); NLRB v. Kentucky River Community Care, Inc., 121 S.Ct. 1861 (May 29, 2001), Sl. Op. at 5. The twelve powers set forth in Section 2(11) of the Act in defining a supervisor are the authority to “hire, transfer, suspend, lay off, recall,

¹¹ Federal and/or state regulations dictate minimum staffing levels, below which a nursing home cannot fall without jeopardizing its state and federal funding. Administrative notice is taken of 42 C.F.R. 483.30 entitled "Subpart B -- Requirements for Long Term Care Facilities" which provides in pertinent part that:

The facility must have sufficient nursing staff to provide nursing and related services to attain or maintain the highest practical physical, mental, and psychological well-being of each resident, as determined by resident assessments and individual care plans.

promote, discharge, assign, reward, or discipline other employees or responsibly direct them, or to adjust their grievances, or effectively recommend such action.”

The burden of proof rests upon the party alleging that an individual is a supervisor. NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001); Bennett Industries, 313 NLRB 1363 (1994). A lack of evidence is construed against the party asserting supervisory status. The Board is reluctant to confer supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See Vencor Hospital – Los Angeles, 328 NLRB 1136, 1138 (1999). The Board has found that a particular indicia of supervisory status has not been established if the evidence is in conflict or otherwise inconclusive regarding that indicia. Phelps Community Medical Center, 295 NLRB 486, 490 (1989). Mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisor authority. Sears Roebuck & Co., 304 NLRB 193 (1991).

Since the Employer is the party asserting the supervisory status of the LPNs in the present case, the Employer has the burden of proof. The Employer has not asserted, nor has it provided any evidence that the LPNs possess the authority to hire, transfer, suspend, lay off, recall, promote, or discharge employees, or effectively recommend such actions. The Employer, however, does contend that the LPNs can assign, reward, and discipline employees, responsibly direct employees, adjust employee grievances, or effectively recommend such actions. The Employer, however, has not met its burden of proof.

A. Assignment and Direction of Work

The role of the LPNs in assigning work does not demonstrate supervisory authority. It is the Staffing Development Coordinator who assigns the staff, including the CNAs, CMAs, and LPNs, to particular units, shifts, and days of the week. Thus, it is the Coordinator who determines their work hours. Although LPNs schedule lunch and rest breaks for the CNAs/CMAs on their units, the Employer has an established policy of providing a specified number of rest breaks per hours worked, and a thirty-minute lunch break. Further, state and/or federal regulations require that nursing care be sufficient to ensure residents' well-being. The LPNs' assignment of break periods is therefore based upon the existing workload and resident care needs. For instance, a break may be cut short if there is an emergency such as a resident falling or dying. Such assignment of lunch and rest breaks is merely clerical and routine, and does not require the use of independent judgment. Providence Hospital, 320 NLRB 717, 732 (1999).

Likewise, an LPN's assigning a CNA to care for a group of residents does not confer supervisory status. The CNAs are typically assigned to the same residents on a day-to-day basis in order to ensure continuity. The record indicates that most, if not all, of the units operate on a rotational basis with the CNAs rotating from one group of residents to another weekly. The record also indicates that the grouping of residents has been adjusted in order to equalize the employees' work load. Assignments made on the basis of equalizing work load are routine in nature, and do not confer supervisory status upon the LPNs. Franklin Home Health Agency, 337 NLRB 826, 830 (2002).

Independent judgment in assigning work may be demonstrated by evidence that an individual has discretion to assign work of differing degrees of difficulty or desirability upon the basis of his or her assessment of an employee's ability or attitude. On the other hand, if the assigned tasks are so routine that they do not require differentiation between employee skill levels, the individual making the assignment will be found to be nonsupervisory. Ten Broeck Commons, 320 NLRB 806 (1996). The record does not contain any specific evidence that the CNAs' skills differ significantly. The tasks performed by CNAs are routine and repetitive in nature and all CNAs and CMAs are fully aware of the tasks they need to complete. The record does contain some conclusionary statements that LPNs take into account differences in CNA experience levels and the amount of weight each can lift in making resident assignments. The record however, does not contain any specific examples of an LPN making resident assignments based upon the skill or ability of a particular CNA, or based upon the special needs of a resident. Further, any evidence that assignments are affected by a CNA's ability to lift greater amounts of weight or personality conflicts, either between two CNAs or between a resident and CNA, does not appear to require independent judgment, but rather common sense. Marion Manor for the Aged and Infirm, 333 NLRB 1084, 1089 (2001). Further, there has been no showing that any of the assignments are more desirable than any others; thus there is no evidence of an LPN's ability to favor or disfavor a CNA by making such assignments. The assignment of routine tasks to employees with similar skills does not require the use of independent judgment and therefore does not confer supervisory status upon individuals making such assignments. Ten Broeck Commons, 320 NLRB 806, 810 (1996).

Similarly, the LPNs' authority to call-in replacements for absent CNAs does not confer supervisory status. The record demonstrates that LPNs have no authority to add to the staffing levels established by the Staffing Development Coordinator. The LPNs' authority only extends to trying to secure replacements for absent employees. In procuring replacements the LPNs may only solicit volunteers; they have no authority to compel an employee to come into work or to work overtime. If the LPN is unsuccessful in securing a volunteer, the unit works short handed. The record contains some conclusory testimony that the LPNs base their decisions concerning who to contact for replacement on their knowledge of CNAs' experience, ability to lift weight, and personality conflicts. However, these criteria, as discussed above, do not demonstrate independent judgment, but common sense. Additionally, the Employer failed to present evidence of any specific instances where LPNs made such determinations. Calling in employees or randomly selecting volunteers, without the ability to compel an employee to come to work or work overtime, does not confer supervisory status upon the LPNs. Beverly Enterprises v. NLRB, 148 F. 3d 1042, 1047 (8th Cir. 1998), enfg. Beverly Enterprises-Minnesota, Inc., 323 NLRB No. 200 (2000); Harborside Healthcare, Inc., 330 NLRB 1334, 1336 (2000).

Additionally, the record fails to establish that the LPNs use independent judgment to responsibly direct employees. The LPNs complete assignment sheets used by CNAs and CMAs based upon the residents' medical care plans. The tasks set forth on these assignment sheets involve routine aspects of resident care, such as assisting residents with bathroom and grooming needs, feeding, and transporting residents to appointments. The CNAs and CMAs are familiar with these tasks and generally need no further instruction in carrying them out. For the most part, the CNAs and CMAs are performing the same care, in the same manner, for the same residents on a daily basis. Directing employees to perform tasks that are routine and familiar

does not require the use of independent judgment. Beverly Health and Rehabilitation Services, Inc., 335 NLRB 635, 669 (2001).

It is not disputed that LPNs monitor the work performed by the CNAs and CMAs to ensure that their tasks are being performed in a proper manner. Upon occasion an LPN may correct the manner in which a CNA or CMA is performing a task. This may involve conducting an “in-service” whereby the LPN explains or demonstrates the correct way to perform a task. These “in-services” appear to be informal in nature. The LPN completes an in-service training record which describes the correct way to perform a task, and requests the CNAs and CMAs to sign the form indicating that they have read the form and/or have been so instructed. The record does not contain any evidence of the consequences, if any, to an employee for failing to attend and/or sign the in-service training record. It is noted that LPNs are not responsible for the initial training and orientation of CNA and CMA employees. The Staffing Development Coordinator performs these duties. The act of calling to the attention of an employee the fact that a task has not been performed correctly, and showing the correct way to perform the task does not confer supervisory status upon an individual. Franklin Home Health Agency, 337 NLRB 826, 831 (2002); Beverly Health & Rehabilitation Services, 335 NLRB 635 (2001).

In addition, the Employer has failed to show that LPNs are held accountable for the work performance of the CNAs/CMAs with whom they work. The Board has found that individuals not fully accountable for the employees with whom they work, are not supervisors within the meaning of Section 2(11) of the Act. Franklin Home Health Agency, 337 NLRB 826, 831 (2001). The Employer offered no evidence demonstrating that any LPN has been disciplined as a result of the conduct or work performance of a CNA. The record contains limited evidence of accountability in the evaluations of LPNs. A total of six LPN evaluations were placed into the record, covering a period of January 2003 through January 2004. It is not known if these represents all the LPN evaluations issued during this time period. A few LPNs received comments on their evaluations concerning their interaction with CNAs. Two received comments that they need to better check CNA documentation and one received a comment that she needs to better ensure that the CNA job duties are carried out. Five LPNs received general comments that they possessed “good supervisory skills.” However, these evaluations do not rate or assign a numerical score to the LPNs' alleged supervisory skills. Nor did the Employer provide any evidence that the LPNs' overall numerical ratings, or wage increases, were impacted by the comments on the evaluations.

Based upon the above, the Employer has failed to sustain its burden of establishing that LPNs either assign work or responsibly direct employees using independent judgment.

B. Discipline

The Employer contends that LPNs possess the authority to issue and recommend discipline, including the authority to send employees home for serious rule violations. A close examination of the record evidence fails to sustain this assertion, however. Although LPNs complete Disciplinary Action Reports indicating that a CNA has violated the Employer's rules, policies or procedures, the record fails to establish that these reports actually constitute disciplinary action, or that they automatically lead to discipline. The DON testified that the

Employer has a progressive disciplinary system and that a next more severe level of discipline automatically follows the issuance of a lesser discipline. However, the evidence regarding the manner in which the LPNs prepare the disciplinary reports indicates that the forms have no effect under this system. LPNs have no access to employee personnel files and therefore, absent personal knowledge of an employee's prior discipline record, have no knowledge of an employee's disciplinary history. Absent such knowledge, they cannot determine the appropriate level of discipline for any given infraction. Thus, an LPN may checkmark "First Notice" on a report when in fact the employee has already been disciplined multiple times for the same offense. According to the DON, disciplinary levels check marked on the reports are not changed by management, even if in error. Therefore, the reports appear to play no rational role in the progressive system of discipline outlined in the Employee Handbook. In addition, in some cases LPNs document an incident, but do not indicate the issuance of any discipline on the form. Lastly, there is no evidence that these reports have had any actual effect upon any employee's tenure or terms of employment. There is no evidence that any employee has been terminated, been denied a raise, or suffered any other adverse effect upon their terms of employment because of these reports. In the one instance in the record where a report indicates that it is a "Final Notice," the Unit Manager, not an LPN, made the decision to issue this discipline. It thus appears that the Disciplinary Action Reports completed by the LPNs are merely reportorial, and do not evidence the issuance of discipline. The authority to complete such reports does not confer supervisory status where they have no clear connection to more serious disciplinary action or tangible effect upon an employee's job status. Green Acres County Care Center, 327 NLRB 257, 257-258 (1998). Since there is no evidence that the issuance of the Disciplinary Action Reports has had any actual impact upon an employee's job status, it cannot be concluded that they constitute an effective recommendation of discipline, either.

While there is some testimony that the LPNs have been told they have the authority to send home CNAs for "justifiable" conduct, the record contains no evidence of any LPN exercising such authority. The one instance in the record indicates that an LPN contacted the DON to obtain permission before sending a CNA home, and that ultimate authority to make the decision rested with the DON. In addition, the record does not identify the offense for which the CNA was being sent home. Even if LPNs have the authority to send home CNAs for such egregious conduct as intoxication, resident abuse, or gross insubordination, such authority is insufficient to confer supervisory status. Sending employees home for flagrant rule violations is not indicative of supervisory status because it does not require the use of independent judgment. Michigan Masonic Home, 332 NLRB 1409, 1411, fn. 5 (2000).

Accordingly, the evidence concerning the authority of LPNs to issue or effectively recommend discipline is insufficient to establish supervisory status.

C. Performance Evaluations, Rewards and Adjustment of Grievances

The Employer also contends that the LPNs' evaluations of CNAs is an indicia of supervisory status. The enumeration of supervisory powers in Section 2(11) does not include "evaluate." It is only when evaluations affect the wages or employment status of employees that the individual performing the evaluations will be found to be a supervisor. Franklin Hospital Medical Center d/b/a Franklin Home Health Agency, 337 NLRB 826 (July 2002); Harborside

Healthcare, Inc., 330 NLRB 1334 (2000). In the instant case the Employer failed to present evidence establishing a direct link between the numerical score on the evaluations and wage increases. The Employer presented no evidence of any guidelines or methodology used to determine the amount of a wage increase based upon the score on an evaluation. More importantly, although the testimony indicates that LPNs are aware that the evaluation relates generally to CNAs' wages, they have no knowledge of the impact any particular score may have upon a CNA's income. Thus, if an LPN wished to either economically reward or punish an employee, s/he would not know what score would accomplish the feat. The evidence indicates instead that the performance evaluations are reportorial in nature, and do not evidence supervisory authority. Harborside Healthcare, Inc., 330 NLRB 1334 (2000).

The Employer asserts that LPNs possess the authority to adjust employee grievances. The Employee Handbook contains an employee complaint procedure which provides that if employees have a concern or problem, they should discuss it with their "immediate supervisor." Additionally, the DON testified that LPNs would be the "immediate supervisor" referenced in the handbook. The DON also testified that the LPNs have authority to resolve such grievances as CNA complaints about their work assignments or break periods, and co-worker problems. The record, however, is devoid of any evidence of specific instances when an LPN adjusted a grievance, or played any other role in the resolution of an employee complaint. Even if the LPNs have the authority to resolve minor disputes such as co-worker personality problems, this would be insufficient to establish supervisory status. Ken Crest Services, 335 NLRB 777, 779 (2001).

In addition, although LPNs sign "Missed Punch Reports" when an employee on his/her unit has failed to punch the time card, there is no evidence that by doing so, the LPN is authorizing the payment of wages for the employee. In addition to the signature of an LPN, each report also bears the initials of the facility's Administrator and it is more reasonable to conclude that her initials constitute payment authorization, rather than that of the LPN.

D. Secondary Indicia

When there is no evidence that disputed individuals possess any one of the twelve primary indicia of supervisory status enumerated in Section 2(11), the presence of secondary indicia alone is not sufficient to confer supervisory status. Ken-Crest Services, 335 NLRB 777, 779 (1998); General Security Services Corp., 326 NLRB 312 (1998), *enfd.* 187 F.3d 629 (8th Cir. 1998). Therefore, factors such as a difference in compensation, supervisor/employee ratio, and the status of being the highest ranking employee on site, are not determinative in this case. The fact that the LPNs earn a higher wage than CNAs is reflective of the difference in education levels, rather than an indication of supervisory authority. Additionally, a ratio of approximately 1 supervisor to 12 employees is not excessive given the routine nature of duties associated with patient care at the facility.¹² Finally, there is nothing in the definition of

¹² This ratio is based upon the number of persons the parties stipulated are supervisors, including the Administrator, DON, RN Charge Nurse, two Unit Managers, Weekend Supervisor, and Staffing Development Coordinator. There are therefore, seven supervisors for 86 employees within the Nursing Department.

“supervisor” found in Section 2(11) that implies that service as the highest ranking authority requires a finding that such an individual must be a statutory supervisor. Training School at Vineland, 332 NLRB 1412 (2000).

E. Conclusion

Based upon the evidence described above, it is concluded that the Licensed Practical Nurses employed by the Employer are not supervisors within the meaning of Section 2(11) of the Act. Accordingly, Licensed Practical Nurses shall be included in the unit found appropriate herein.

V. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the unit who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are former unit employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the United Steelworkers of America, AFL-CIO, CLC.

VI. NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. Club Demonstration Services, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

VII. LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the undersigned within 7 days from the date of this Decision. North Macon Health Care Facility, 315 NLRB 359 (1994). The undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 25's Office, Room 238, Minton-Capehart Federal Building, 575 North Pennsylvania Street, Indianapolis, Indiana 46204-1577, **on or before May 4, 2004**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

VIII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099-14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by May 11, 2004.

SIGNED at Indianapolis, Indiana, this 27th day of April, 2004.

/s/ Rik Lineback

Rik Lineback
Regional Director
National Labor Relations Board
Region Twenty-five
Room 238, Minton-Capehart Building
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RL/jcm/ar
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